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No. 93 - 1652

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit properly set aside a state court death sentence because the penalty phase instructions, taken as a whole, provided the jury with inaccurate and misleading information regarding the likelihood that respondent would be paroled if not given a death sentence and which unduly emphasized California's commutation and parole procedures in violation of California v. Ramos, 463 U.S. 992 (1983), and because respondent had no opportunity to explain or deny the false and misleading information?

2. Can a federal court set aside a state court death sentence based on an instructional error in the penalty phase by applying the reasonable likelihood test of Boyde v. California, 494 U.S. 370 (1990), and without considering the harmless error test of Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), where petitioners waived any argument that Brecht would apply and never raised the issue of harmless error?

3. Does a federal court create a new rule of law within the meaning of Teague v. Lane, 489 U.S. 288 (1989), when it finds reversible error in an inaccurate and misleading modification of the penalty phase instruction on commutation where the unmodified instruction was deemed constitutional in California v. Ramos, 463 U.S. 992 (1983)?

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Respondent Bernard Lee Hamilton respectfully requests that this Court deny the petition for writ of certiorari filed by Petitioners Arthur Calderon and Daniel Lungren, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 17 F.3d 1149 (9th Cir. 1994) and is set forth in Appendix A to the Petition for Writ of Certiorari ("Appendix A").

CONSTITUTIONAL PROVISIONS

This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishment."

It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that no state may "deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Respondent Bernard Hamilton was convicted of capital murder and sentenced to death on March 2, 1981. On December 31, 1985, the California Supreme Court affirmed the judgment of guilt but, relying on Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal. Rptr. 79, 672 P.2d 862 (1983), set aside the special circumstance findings and reversed the penalty judgment because the trial court failed to instruct the jury that it had to find that Hamilton had intended to kill the victim in order to find the special circumstances true. People v. Hamilton, 41 Cal.3d 408, 221 Cal. Rptr. 902, 710 P.2d 981 (1985)("Hamilton I"). On July 7, 1986, this Court granted the State's petition for certiorari, vacated the judgment and remanded to the California Supreme Court for reconsideration in light of Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 478 U.S. 1017 (1986). In 1987, a newly constituted California Supreme Court overturned Carlos. People v. Anderson, 43 Cal.3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306 (1987).

On May 19, 1988, nearly two years after this Court's remand, the California Supreme Court, without discussing Rose v. Clark, adopted its prior decision as to the guilt conviction, reversed its finding of Carlos error by retroactively applying People v. Anderson, sustained the special circumstance findings and affirmed the imposition of death. People v. Hamilton, 45 Cal.3d 351, 247 Cal. Rptr. 31, 753 P.2d 1109 (1988) ("Hamilton II"). Hamilton's claim that the instruction on commutation violated his federal constitutional rights was raised and rejected on direct appeal in the California Supreme Court. Id. at 372-76. Hamilton's direct appeal became final when this Court denied his petition for writ of certiorari on January 23, 1989. Hamilton v. California, 488 U.S. 1047 (1989).

During the pendency of the state court proceedings, Hamilton filed four pro se habeas corpus petitions in the federal district court, one of which (Dist. Ct. No. CV-86-2101-RMB) alleged that he had been shackled at trial in violation of his federal constitutional rights.[1] The district court denied this petition on the merits on December 19, 1987. Hamilton appealed and on April 23, 1989, the United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions that the district court independently review the state court record and consider holding a hearing in order to determine whether Hamilton was unconstitutionally shackled. Hamilton v. Vasquez, 882 F.2d 1469

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1 The other petitions, as well as one subsequently filed pro se petition, were either dismissed or consolidated with Case No. 86-2101.

(9th Cir. 1989). The Ninth Circuit also directed the appointment of counsel.

Respondent Hamilton, through his counsel, filed an amended and consolidated habeas corpus petition in the district court on October 22, 1990. While petitioners describe several habeas corpus petitions filed in state and federal court by Mr. Hamilton, this amended and consolidated habeas corpus petition was considered by the district court to be a "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings.[2] Hamilton's claim regarding the unconstitutionality of the penalty phase instruction on commutation was raised in this petition, which was rejected by the district court on August 23, 1991.

On November 1, 1991, Hamilton's motion to alter or amend the judgment was denied. The district court granted a certificate of probable cause to appeal on November 13, 1991, and Hamilton timely appealed.

On February 3, 1994, the Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief as to Hamilton's guilt convictions and special circumstance findings. The Court reversed the district court's denial of relief as to

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[2] The Petition contains a lengthy recitation of several pro se habeas petitions filed by Hamilton in the federal district court. Petitioners do not explain why this lengthy discussion is included or how the procedural history of these pro se petitions affected the legitimacy of the Ninth Circuit's opinion. Indeed, on appeal to the Ninth Circuit and on certiorari to this Court, petitioners have conceded that the issues decided by the Ninth Circuit were properly before it in Hamilton's "first" federal petition.

sentence on the ground that the modified and expanded penalty phase instruction on the commutation of a life without possibility of parole sentence violated Hamilton's Eighth and Fourteenth Amendment rights, and remanded the case to the district court with instructions to order new penalty phase proceedings.

An order denying respondent Hamilton's petition for rehearing and suggestion for rehearing en banc was entered on March 22, 1994. On March 31, 1994, the Court of Appeals stayed issuance of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

The State filed in this Court a petition for writ of certiorari on April 19, 1994. Hamilton is concurrently filing with this brief in opposition a cross-petition for certiorari on issues related to the guilt phase of his capital case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. **THE INSTRUCTIONAL ERROR AT ISSUE IS CASE-SPECIFIC**

This Court has long advised counsel practicing before it to refrain from filing petitions for a writ of certiorari as a matter of routine. See, e.g., Sup. Ct. R. 10.1; R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 163-64 (7th ed. 1993) ("The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion of federal questions that have arisen among lower courts, to pass upon questions of wide import

under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." (quoting Chief Justice Vinson, Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949). In an effort to convince this Court to expend its scarce resources in this matter, petitioners assert that the lower court's decision in this case, if left undisturbed, has broad and dire consequences for scores of other death penalty cases in California and nationwide. Petitioners have misconstrued the reach of the Ninth Circuit's opinion and misinformed this Court about the circumstances of other capital cases. In fact, this case involves the court of appeals examining an instruction unique to this case and perhaps to one other California case.

The jury in Mr. Hamilton's case was given the so-called Briggs Instruction that this Court found constitutional in California v. Ramos, 463 U.S. 992 (1983), which provided as follows:

> You are instructed that under the state constitution a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

The jury was then given an additional lengthy instruction, set out in full in Hamilton v. Vasquez, 17 F.3d 1149, 1161-62 (9th Cir. 1994), Appendix A at 49-50, which went far beyond informing the jury of the possibility that a life without possibility of parole sentence could be commuted.

Petitioners are simply wrong when they state that the modified instruction at issue is identical to the instruction given in several other cases. Of the three other cases petitioners cite for this proposition, only one, People v. McLain, 46 Cal.3d 97, 119-120, 249 Cal. Rptr. 630, 757 P.2d 569 (1988), is virtually identical to Hamilton's instruction. The instructions in the other two cases, People v. Coleman, 46 Cal.3d 749, 780-82, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988)[3] and People v. Whitt, 51 Cal.3d 620, 655-57, 274 Cal. Rptr. 252, 798 P. 2d 849 (1990)[4] do not suffer from the same constitutional infirmities as the instruction given in this case. The only similarity between the instructions in Coleman and Whitt, and the instruction in Hamilton's case is that all three caution the jury not to consider the possibility of commutation in determining sentence. However, the instructions in Coleman and Whitt do not include extensive misleading and inaccurate details of the commutation and parole processes, and do not ask the jury to

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[3] The jury in Coleman was given the standard "Briggs Instruction" followed by the following: "So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant. You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole."

[4] In Whitt, the jury was instructed as follows: "The Governor's commutation power applies to both sentences, to wit, one, death or, two, life without possibility of parole. You are further instructed that it would be a violation of your duty as a juror to consider the possibility of such commutation in determining the appropriate sentence."

assume that the Governor and other officials will perform their duty correctly and responsibly and that the defendant "will not be paroled unless he can safely be released into society."

While petitioners estimate that six or eight other unidentified cases may also be at risk from the holding in this case, its inability to cite correctly to more than one other case renders such an estimate highly questionable. Thus, out of the approximately 380 death judgments in California, one other case may be affected by the lower court's decision.

In any event, the Ninth Circuit's ruling is nothing more than an application of Eighth and Fourteenth Amendment death penalty jurisprudence as expounded upon in such cases as Gregg v. Georgia, 428 U.S. 153 (1976), Lockett v. Ohio, 438 U.S. 586 (1978) and California v. Ramos, 463 U.S. 992 (1983). In applying the principles set forth in these cases to the instruction at issue, the lower court found under the reasonable likelihood test of Boyde v. California, 494 U.S. 370 (1990), that the instruction violated the Eighth and Fourteenth Amendments. While petitioners may disagree with the result of the lower court's application of these cases to the specific instruction given to Hamilton's jury, this is not a basis for the grant of certiorari.

II. THE INSTRUCTION GIVEN IS NOT MORE FAVORABLE THAN THE INSTRUCTION FOUND CONSTITUTIONAL IN CALIFORNIA V. RAMOS

Respondent Hamilton does not dispute that the unmodified Briggs Instruction is constitutionally sound pursuant to California v. Ramos, 463 U.S. 992. Rather, as the Ninth Circuit found, the additional instruction given in this case violated the

Eighth and Fourteenth Amendment principles relied on in Ramos, in that it provided inaccurate and misleading information to the jury and unduly emphasized the commutation and parole processes, thereby implying that a sentence of life without possibility of parole would probably, not possibly, be commuted or modified. The prosecutor exploited the misleading nature of the instruction in his closing argument, while Hamilton was barred by well-established state law from presenting evidence on the improbability of commutation.

This Court approved of the Briggs Instruction in Ramos because it assumed that the trial court's provision of accurate information about the governor's commutation power would not permit the jury to speculate about the likelihood of the defendant's release on parole. California v. Ramos, 463 U.S. at 1004. Here, the jury was not simply informed about the Governor's power to commute a life without possibility of parole sentence. The jury was instructed that if it:

> believe[d] that life imprisonment without the possibility of parole was the proper sentence, [it] must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society.

Hamilton v. Vasquez, 17 F.3d at 1161, Appendix A at 50. This goes beyond merely informing the jury of a governor's power of commutation. The jury is asked to assume that petitioner's sentence would be commuted, and to then speculate about his parole status. As the Ninth Circuit recognized, "[t]his language

not only created a negative implication that the officials would not properly perform their jobs but it invited the jury to assume that the question of Hamilton's release would automatically come before these officials." Id. at 1161, Appendix A at 48.

The instruction thus incorrectly suggested that if Hamilton were sentenced to life without the possibility of parole, he would most likely have his sentence commuted and ultimately be released. Such an assumption is incorrect. The hurdles standing in the way of parole eligibility were quite formidable, and the possibility that Hamilton would be released on parole were extremely remote. See Hamilton v. Vasquez, 17 F.3d at 1162.

The instruction given in Hamilton's case was also inaccurate and misleading in other respects. The instruction's reference to the fact that a life-sentenced prisoner could be eligible for parole after serving "25 years, less one-third off for good time credit," was misleading insofar it did not adequately explain that this applied to life sentences with the possibility of parole and that Hamilton would be eligible for parole only if the life sentence without possibility of parole was commuted first.[5]

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[5] In addition, this portion of the instruction suggested that the question of commutation would necessarily be considered before a defendant had served the minimum 16 and 2/3 years. The parole authority, now known as the Board of Prison Terms, will review the case of an inmate serving a life without possibility of parole sentence, whose capital crime was committed on or before September 11, 1982, for referral to the governor for commutation or pardon after 12 years have been served, where the inmate has suffered no more than one felony conviction. However, where, as in Hamilton's case, the inmate is a twice-convicted felon, he must apply directly to the governor, and the governor must refer the case to the Board of Prison Terms before the Board can investigate and report on the application. Cal. Penal Code

The likelihood that the jury improperly speculated about Hamilton's eventual parole and voted for death in order to ensure that he not be released was compounded by the prosecutor's closing argument in which he stated that if sentenced to prison, Hamilton would be "conniving and devising ways to manipulate the system and get out." Hamilton v. Vasquez, 17 F.3d at 1162, Appendix A at 54. The prosecutor's comments made sense only in the context of the commutation instruction, which confirmed that it was likely that petitioner could "manipulate the system and get out," despite a verdict of life without possibility of parole. Furthermore, unlike in Ramos, 463 U.S. 1012, the instruction in this case was given undue emphasis. The sheer length of the instruction magnified the importance of the Governor's powers. Moreover, the instruction was delivered not once but twice to the jury; the second occasion was in response to an unrelated question from the jury on the third day of deliberations.

The instruction thus had the opposite effect from what this Court concluded regarding the unadorned instruction: it invited the jury to "predict . . . what some future Governor [or parole authority] might do" instead of "what the defendant himself might do if released into society." Ramos, 463 U.S. at 1005.

Ramos upheld the Briggs Instruction in part because it assumed that the instruction "gives the jury accurate information of which both the defendant and his counsel are aware, and it

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§§ 4801-4802, 4812-4813; 15 Cal. Code of Regulations § 2816-2817.

does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." California v. Ramos, 463 U.S. at 1004. Not only was the instruction in Hamilton's case inaccurate and misleading, Hamilton was precluded under then-existing state law from providing any evidence to mitigate the adverse inferences which the jury may have drawn from the instruction. At the time of Hamilton's trial, California state law "prevented defense counsel from showing the actual likelihood of a person ever being paroled if he were sentenced to life imprisonment." Hamilton v. Vasquez, 17 F.3d at 1162, Appendix A at 52 (citing People v. Morse, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33 (1964)). Morse specifically overruled prior precedent which permitted the introduction of evidence and argument regarding the possibility that parole would be granted to a defendant serving a life sentence. As a result, the jury in Hamilton's case was permitted to learn that the Governor had the power to commute a life sentence, but well-settled California law precluded any attempt to introduce evidence to show that, as a practical matter, commutation was extremely unlikely.

Thus, contrary to petitioners' assertion, the Ninth Circuit's holding in this case did not violate this Court's holding in Ramos, but is dictated by it. The instruction given in Hamilton's case, unlike the one in Ramos, was inaccurate and misleading, and together with the prosecutor's improper argument and the preclusion of defense evidence on the remote possibility

that a life without possibility of parole sentence would be commuted, "divert[ed] the jury from undertaking the kind of individualized sentencing determination that . . . is 'a constitutionally indispensable part of the process of inflicting the penalty of death.'" Ramos, 463 U.S. at 1005 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

III. THE LOWER COURT APPLIED CORRECTLY BOYDE V. CALIFORNIA

Petitioners argue that the Ninth Circuit failed to apply Boyde v. California, 494 U.S. 370 (1990) to determine whether the instruction was applied in an unconstitutional manner. Petitioners are wrong. The Ninth Circuit clearly applied Boyde, recognizing that Boyde "requires us to look at the instructions as a whole to determine whether there is a reasonable, objective likelihood that the jury was misled," and finding that "there is a reasonable likelihood that the jury impermissibly applied the modified Briggs instruction." Hamilton v. Vasquez, 17 F.3d at 1163, 1164, Appendix A at 58-61.

While the jury was instructed not to consider the possibility of commutation, as the Ninth Circuit recognized, this admonition could not have cured the error of the instruction: "Here, where the trial court told the jury not to consider what it had just been instructed were relevant considerations, the jury must have been misled." Id. at 1163, Appendix A at 58. As the dissent from the state court's opinion recognized, "[t]he Governor's power was given too much importance and emphasis to allow further instructions to eliminate the prejudice." Hamilton

II, 45 Cal.3d at 382 (Broussard, J., dissenting). Moreover, the instruction was intrinsically contradictory in that it told the jury to assume that those in charge of the parole system will act correctly and responsibly, but at the same time not to consider or speculate whether commutation or parole would ever occur. Even if the cautionary instruction was unambiguous, this is one of the rare instances where a cautionary instruction could not cure the harm. See Bruton v. United States, 391 U.S. 123, 129 (1968). Furthermore, the prosecutor undid any effect the cautionary instruction might have had by asking the jury to consider that Hamilton would likely be released from prison. See Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Petitioners mislead this Court when they argue that there is no reason to believe that the jury did not follow the trial court's admonition not to consider the likelihood that a life without possibility would be commuted or modified. A sworn declaration from the jury foreman, presented to both the district court and court of appeals without objection, clearly states that during its penalty phase deliberations the jury discussed the governor's commutation power and that if given a life without parole sentence, Hamilton would likely be paroled.[6] As this declaration makes clear, respondent's jury did not follow the trial court's admonition and did focus on the Governor's

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[6] The declaration of jury foreman, Orlow Garrett, was filed with the district court in support of Hamilton's motion to alter or amend the judgment and/or for new evidentiary hearing. Ninth Circuit Court of Appeals Excerpts of Record, pp. 000302 A-C.

commutation power in determining sentence. The jury foreman declared that during penalty phase deliberations the jury discussed "the likelihood that a life without possibility of parole sentence would be commuted" and discussed their fear that if they voted for life without the possibility of parole, "Hamilton's sentence would be commuted and he would be released from prison." Thus, petitioners' claims about the curative nature of the instruction must be rejected. It is evident that the jury voted for death not based on the a determination of the appropriate sentence under the circumstances of Hamilton's case, but because they were under the mistaken impression that if given life without the possibility of parole, Hamilton would most likely be paroled.

Petitioners criticize the Ninth Circuit's opinion for failing to engage in a harmless error analysis pursuant to Brecht v. Abrahamson, 507 U.S. __, 113 S.Ct 1710, 123 L.Ed.353 (1993), in addition to the analysis under Boyde. First, it should be noted that petitioners failed in their briefing in the district court or in the court of appeals to argue that any error would be harmless or sought to have the court apply Brecht or any harmless error standard to the issue. Nor, once the court of appeals found error, did respondent seek on rehearing for an application of harmless error. Petitioners should therefore be precluded from raising this claim for the first time before this Court. See Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

In any event, assuming that Brecht is applicable to this

case, the clear implication of the Ninth Circuit's analysis under Boyde is that the error was not harmless, but had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct at ___. The Ninth Circuit's finding of prejudice is fully supported by the record and the sworn juror declaration. The defense called seven witnesses at the penalty phase, and the jury deliberated for three days. As the Ninth Circuit recognized, "[t]he lengthy deliberation, coupled with the mitigating evidence presented, supports the conclusion that the detailed instruction on the possibility of commutation and parole prevented the jury from properly considering Hamilton's penalty." Hamilton v. Vasquez, 17 F.3d at 1163, Appendix A at 56.

IV. THE LOWER COURT'S RULING DOES NOT CREATE A NEW RULE

Petitioners argue that the Ninth Circuit's determination that the penalty phase instruction on commutation violated petitioner's Eighth and Fourteenth Amendment rights to an individualized and reliable sentencing determination created a new rule which cannot be applied retroactively to Hamilton's case pursuant to Teague v. Lane, 489 U.S. 288 (1989).

Petitioners never raised Teague below. Petitioners seek to excuse their failure to argue Teague in the district court or the Ninth Circuit because the so-called "new rule arose when the majority made an unexpected departure from Ramos and Boyde." Petition at 47 n.5. The fact that petitioners did not believe they would lose on the issue does not excuse their failure to raise a non-retroactivity defense below.

The Teague bar to the retroactive application of new rules is not jurisdictional. See Collins v. Youngblood, 497 U.S. 37, 41 (1990). Thus, the state can waive the Teague bar by not raising it below. A federal court "may, but need not, decline to apply Teague if the State does not argue it." Caspari v. Bohlen, 127 L.Ed.2d 236, 245 (1994) (citing Schiro v. Farley, 127 L.Ed.2d 47 (1994)).

It is clear, however, that the Ninth Circuit's decision in this case did not create a new rule. A new rule is one which "breaks new ground or imposes a new obligation on the States or the Federal Government." Teague v. Lane, 498 U.S. at 301. "A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.[7]

While the instruction given in Hamilton's trial is distinguishable from the two-sentence instruction given in Ramos, the Ninth Circuit's opinion is a straightforward application of Ramos and this Court's seminal rulings on the constitutionality of capital punishment procedures.[8] It applies Gregg v.

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[7] Petitioners incorrectly calculate the date of finality by using the time of trial, 1981. In fact the date of finality is January 23, 1989, the date this Court denied Hamilton's petition for certiorari. Hamilton v. California, 488 U.S. 1047 (1989). See Stringer v. Black, 503 U.S. __, 112 S.Ct. 1130, 1134, 117 L.Ed.2d 367, 376 (1992).

[8] One of the principles underlying the Teague doctrine is to validate "reasonable, good faith interpretations of existing precedents made by state courts . . . ." Butler v. McKellar, 494 U.S. 407, 414 (1990). Thus, where an instruction had been uniformly applied for many years, "such an institutionalized state practice over a period of years is strong evidence of the

Georgia, 428 U.S. 153 (1976), Lockett v. Ohio, 438 U.S. 586 (1978) and California v. Ramos, 463 U.S. 992 (1983) to the instruction at issue. As the Ninth Circuit stated, it "examine[d] the challenged instruction in light of these exacting standards for fair and informed jury deliberation in death penalty cases." Hamilton v. Vasquez, 17 F.3d at 1160. The Ninth Circuit found that because the instruction was inaccurate and misleading and that respondent was precluded from presenting accurate information regarding the unlikelihood that he would ever be released if sentenced to life without possibility of parole, respondent's Eighth and Fourteenth Amendment rights were violated.

This Court recognized in Gregg v. Georgia that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die . . . ." Where, as here, the jury's view of the sentencing alternatives is distorted a needless risk is introduced that the jury will impose death based on inaccurate and misleading information in violation of the Eighth Amendment. Furthermore, the bar to defense evidence on commutation violated the

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reasonableness of the interpretations given existing precedent by state courts." Gilmore v. Taylor, 124 L.Ed.2d 306, 320 n. 3 (1993). In that regard, the unmodified Briggs Instruction was no longer used after it was found to violate the state constitution in People v. Ramos, 37 Cal.3d 136, 207 Cal. Rptr. 800, 689 P.2d 430 (1984), and the modified version of the instruction given here, while found by the California Supreme Court to be non-prejudicial in view of the cautionary language, was held "to mislead and to invite speculation on irrelevant and improper matters." People v. Hamilton, 45 Cal.3d at 375.

"elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'." Skipper v. South Carolina, 476 U.S. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. 349, 362 (1979).

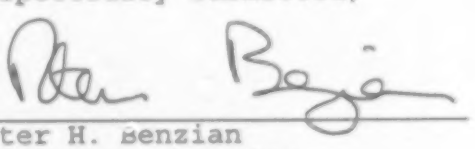
The Ninth Circuit's holding in this case is by no means "irreconcilable" with this Court's precedents. See Graham v. Collins, 113 S.Ct. 892, 898-902 (1993). On the contrary, it is compelled by them.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

DATED this 17th day of May, 1994.

Respectfully submitted,



Peter H. Benzian
of Latham & Watkins

Attorneys for Respondent
Bernard Lee Hamilton

AFFIDAVIT OF SERVICE BY MAIL

I, the undersigned, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 701 B Street, Suite 2100, San Diego, California 92101.

I have served the within **BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** as follows to the parties indicated below:

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOUS
Supervising Deputy Attorney General
110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

The Hon. Rudi M. Brewster
United States District Court
940 Front Street
San Diego, CA 92189

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 17th day of May, 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California on May 17, 1994.

Christine E. Cummins
CHRISTINE E. CUMMINS

Subscribed and sworn to before me
this 17th day of May, 1994.

Notary Public in and for said
County and State

CANDACE L. CHARLET
COMM.#1004991
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMMISSION EXPIRES
SEPTEMBER 12, 1997

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 93-1652

ARTHUR CALDERON, Warden (Petitioner) vs. BERNARD LEE HAMILTON (Respondent)

The Clerk will enter my appearance as Counsel of Record for the Criminal Justice Legal Foundation

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☐ Respondent(s) ☒ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Kent S. Scheidegger

(Type or print) Name Kent S. Scheidegger

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Criminal Justice Legal Foundation

Address Post Office Box 1199

City & State Sacramento, California Zip 95812-9950

Phone (916) 446-0345

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

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